

A TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — SUIT NO D6–28–9 OF 2000
HAMID SULTAN J
31 OCTOBER 2011

C *Companies and Corporation — Winding up — Liquidators — Application to remove — Factors considered to justify his removal — Whether liquidator failed to exercised his discretion in best interest of liquidation — Whether circumstances justifying his removal — Companies Act 1965 s 232(1)*

D This was an application by the creditor and/or contributory in the respondent seeking an order for the removal of the liquidator, Chuah Seong Phaik ('Chuah'), and further, the liquidator to be ordered personally to pay the creditor and/or contributory his costs. The said application was filed as early as 2005 and was delayed for nearly six years because of some unfinished business of the apex court and quite recently ie June 2011, Equiticorp Holdings Sdn Bhd and Equiticorp Financial Services Ltd ('Equiticorp') had filed a notice of motion seeking an order for the appointment of Robert Teo Keng Tuan as the liquidator of the respondent. Equiticorp supported the removal of Chuah. In addition, United Securities Sdn Bhd ('USSB') also supported the removal application, and they were all interested parties in respect of the winding up proceedings. The grounds for the said application were as follows: (i) the appointed liquidator was unfit and not able to perform his duties impartially; (ii) the liquidator breached his statutory duties; (iii) the liquidator breached his fiduciary duties; (iv) the liquidator acted in conflict of interest; and (e) the liquidator was in contempt of court. The common ground of complaint by the applicant, Equiticorp and USSB was that Chuah had failed to abide by the consent order of the court which specifically provided that he has to act together with committee of inspection.

G **Held**, allowing the application to remove the liquidator:

- H** (1) The court is obliged to remove the liquidator *in limine* if he has failed to act within the spirit and intent of the several provisions of the Companies Act 1965 and more importantly when he acted outside the scope of his appointment or order of court or failed to protect the interest of the creditors and/or contributories or was not justly, expeditiously and economically pursuing to conclude the liquidation process as it must not be forgotten that he is an officer of court and his acts or omission must not place the administration of justice to disrepute (see para 15(1)).
- I** (2) In the instant case, the liquidator had not, inter alia, diligently acted on

the security requirement, failed to obtain the sanction of the creditors and/or contributories, omitted to exercise his statutory duties, failed to seek appropriate directions from the court for just, expeditious and economical disposal of the liquidation process, notwithstanding the winding up order was made some ten years ago and substantial assets worth about quarter billion had not been satisfactorily dealt with (see para 15(m)).

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- (3) Very importantly, the liquidator in the instant case being an officer of court was in gross contempt and/or disrespect to the order of court when he proceeded to act in the liquidation process in the absence of committee of inspection. In doing so he had exposed himself to personal liability and he may not only be liable to the creditors and/or contributories but also to other service providers whom he had appointed and now will not be able to be indemnified from the assets of the respondent company as the protective sections in ss 232(8), 268(1) of Companies Act 1965 etc may not apply if the act done was in breach of a court order. Regrettably, Chuah by not complying with the court order may have placed his position equivalent to a tortfeasor and/or *de son tort* (see para 15(m)).

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- (4) In addition, such contempt must be taken cognizance by the official receiver and appropriate investigation of the liquidation process must be made and informed to the relevant Ministry which gave license to the liquidator to take necessary action. Contempt of court order by liquidator who is an officer of court must be severely dealt with and the relevant authorities and/or creditors and/or contributories must act to arrest such conduct *in limine* (see para 15 (m)).

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[Bahasa Malaysia summary]

Ini adalah permohonan oleh pemiutang dan/atau penyumbang di dalam responden memohon perintah untuk penyingkiran pelikuidasi, Chuah Seong Phaik ('Chuah'), dan selanjutnya, pelikuidasi tersebut diperintahkan secara peribadi membayar pemiutang dan/atau penyumbang, kosnya. Permohonan tersebut difailkan seawal tahun 2005 dan dilambatkan hampir enam tahun disebabkan oleh urusan yang tidak dipenuhi oleh mahkamah tertinggi dan baru-baru ini iaitu pada Jun 2011, Equiticorp Holdings Sdn Bhd and Equiticorp Financial Services Ltd ('Equiticorp') telah memfailkan notis usul memohon perintah pelantikan Robert Teo Keng Tuan sebagai pelikuidasi responden. Equiticorp menyokong penyingkiran Chuah. Tambahan, United Securities Sdn Bhd ('USSB') juga menyokong permohonan penyingkiran tersebut, dan mereka adalah pihak yang berkepentingan berkaitan dengan prosiding penggulangan. Alasan-alasan untuk permohonan tersebut adalah seperti berikut: (i) pelikuidasi yang dilantik adalah tidak sesuai dan tidak boleh melaksanakan tugasnya dengan adil; (ii) pelikuidasi tersebut memungkirkan tanggungjawab statutorinya; (iii) pelikuidasi tersebut memungkirkan

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A tanggungjawab fidusiarinya; (iv) pelikuidasi tersebut bertindak bercanggah dengan kepentingan; dan (e) pelikuidasi menghina mahkamah. Aduan alasan umum oleh pemohon, Equiticorp dan USSB adalah bahawa Chuah telah gagal mematuhi perintah persetujuan mahkamah yang khususnya diperuntukkan bahawa dia perlu bertindak bersama dengan jawatankuasa pemeriksaan.

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Diputuskan, membenarkan permohonan untuk menyingkirkan pelikuidasi:

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(1) Mahkamah terpaksa menyingkirkan pelikuidasi *in limine* jika dia gagal bertindak dalam rangkuman semangat dan niat beberapa peruntukan Akta Syarikat 1965 dan lebih penting lagi apabila dia bertindak di luar skop pelantikan atau perintah mahkamah atau gagal untuk melindungi kepentingan pemiutang dan/atau penyumbang atau tidak, secara adil, cekap dan secara ekonomi, meneruskan untuk menamatkan proses likuidasi kerana ia tidak boleh dilupakan bahawa dia adalah pegawai mahkamah dan tindakan atau peninggalannya tidak patut memberikan pentadbiran keadilan nama buruk (lihat perenggan 15(1)).

(2) Di dalam kes ini, pelikuidasi tidak, antara lain, secara bijak bertindak atas permintaan sekuriti, gagal untuk mendapatkan persetujuan pemiutang-pemiutang dan/atau penyumbang-penyumbang, gagal melaksanakan tanggungjawab statutorinya, gagal untuk memohon arahan yang wajar daripada mahkamah untuk keputusan yang adil, cekap dan ekonomi, proses likuidasi, walaupun perintah penggulungan dibuat sepuluh tahun dahulu dan sebahagian besar aset yang bernilai suku bilion tidak diuruskan secara yang memuaskan (lihat perenggan 15(m)).

(3) Amat penting sekali, pelikuidasi di dalam kes ini sebagai pegawai mahkamah, menghina mahkamah dan/atau tidak menghormati perintah mahkamah apabila dia meneruskan untuk bertindak dalam proses likuidasi dalam ketiadaan jawatankuasa pemeriksaan. Dalam berbuat demikian, dia telah mendedahkan dirinya kepada liabiliti peribadi dan dia mungkin bukan sahaja bertanggungjawab kepada pemiutang-pemiutang dan/atau penyumbang tetapi juga kepada pemberi perkhidmatan lain yang dia lantik dan kini tidak akan boleh membayar ganti rugi daripada aset-aset syarikat responden kerana seksyen-seksyen melindungi di dalam ss 232(8), 268(1) Akta Syarikat 1965 dan lain-lain mungkin tidak beraplikasi jika tindakan tersebut dilakukan dalam kemungkiran perintah mahkamah. Dengan dukacita, Chuah dengan tidak mematuhi perintah mahkamah mungkin telah meletakkan dirinya sama dengan pelaku salah dan/atau *de son tort* (lihat perenggan 15(m)).

(4) Tambahan, penghinaan yang sedemikian mesti diambil perhatian oleh pegawai penerima siasatan yang sewajarnya mengenai proses likuidasi mesti dibuat dan diberitahu kepada Kementerian yang relevan yang

memberikan lesen kepada pelikuidasi untuk mengambil tindakan yang perlu. Penghinaan mahkamah oleh pelikuidasi yang merupakan pegawai mahkamah mesti diuruskan dengan sepenuhnya dan pihak-pihak berkuasa relevan dan/atau pemiutang dan/atau penyumbang mesti bertindak untuk menangani tindakan sedemikian *in limine* (lihat perenggan 15(m)).]

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Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1368–1420).

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Cases referred to

Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor [2007] 5 MLJ 685; [2007] 7 CLJ 516, HC (refd)

Adam Eyton, Re Limited Ex parte Charlesworth (1887) 36 Ch D 299 (refd)

Anglesea Colliery Company, Re (1866) LR 555 (refd)

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Baron Cigarette Company Limited, Re (1912) TLR 394 (refd)

Advance Housing v Newcastle Classic (1994) 14 ACSR 230 (refd)

Australian Securities and Investments Commission v Edge [2007] VSC 170 (refd)

Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, petitioners), Re [1992] 1 MLJ 429; [1991] 3 CLJ 1762, HC (refd)

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Bydand Ltd v Mark Feldman & Co EWCA Civ 74, CA (refd)

Chi Liung Holdings Sdn Bhd v Soon Kok Seng (Pelikuidasi Chi Liung & Sons Sdn Bhd Dalam Penggulangan) [1996] MLJU 197; [1996] 3 CLJ 86, HC (refd)

Chua Boon Chin v JM McCormack & Ors [1979] 2 MLJ 156 (refd)

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City & Suburban v Smith (1998) 28 ACSR 328 (refd)

Commissioner for Corporate Affairs v Harvey [1980] VR 669 (refd)

Edennote Ltd, Re [1996] 2 BCLC 389 (refd)

George A Bond and Co, Re [1932] NSW 301 (refd)

Goonal Pty Ltd (in liq), Re (1977) 3 ACER 408 (refd)

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Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (In Liquidation) [1998] 3 MLJ 820, HC (refd)

Handberg, Greight Pty Ltd (in liquidation), Re (2006) 24 ACLC 323 (refd)

Hiew Kiang Hoe & Anor v Shencourt Properties Sdn Bhd [2011] 7 CLJ 158 (refd)

John Wiper Ltd, Re (1972) 22 FLR 206 (refd)

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Keith Morris Pty Ltd & Ors, Re [1971–1976] ACLC 28, 244 (refd)

King, The v Kysant (Lord) [1932] 1 KB CCA 442 (refd)

Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd [1998] 6 MLJ 330, HC (refd)

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Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)

Miharja Development Sdn Bhd & 8 Ors v Tan Sri Datuk Lay Mean Heong & 9 Ors and Another Case [1995] 1 CLJ 523 (refd)

Murray Engineering Company Limited, Re (1925) SC 330 (refd)

Obie Pty Ltd (No 4), Re [1983] 8 ACER 967 (refd)

- A** *Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, intervener)* [2006] 7 MLJ 28, HC (refd)
North Plaza Sdn Bhd v United Securities Sdn Bhd [2010] 1 MLJ 631; [2010] 1 CLJ 470, CA (refd)
Pace & Anor v Antlers Pty Ltd (in liq) (1998) 26 ASCR 490 (refd)
- B** *Pacific Acceptance Corporation Ltd, Re* [1977] 2 ACER 528 (refd)
Parmalat Capital Finance Ltd and others v Food Holdings Ltd (in liquidation) and another [2008] UKPC 23 (refd)
Procam (Pte) Ltd v Nangle & Anor [1990] 3 MLJ 269, HC (refd)
Rubber and Produce Investment Trust, Re (1915) 1 Ch D 382 (refd)
- C** *SBF Builders Sdn Bhd v Bennes Engineering Sdn Bhd* [2009] MLJU 953 (refd)
Sir John Moore Gold Mining Co, Re (1879) 12 LR Ch D 325 (refd)
Tea (1983) Ltd (receivers and managers appointed) (provisional liquidators appointed), Re [1984] 2 ACLC 183 (refd)
TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567, HC (refd)
- D** *Woodsville Sdn Bhd v Tein Ik Enterprise Sdn Bhd & Ors* [2000] MLJU 265, HC (refd)
Yap Chong Hai v Yap Cheng Hai Feng Shui Center of Excellence Sdn Bhd Suit No D3–28–821 of 2004 (refd)
- E**

Legislation referred to

Companies Act 1965 ss 227(6) 228, 228(a), 229, 232(1), (3), (8), 233, 236(1), (2), 237(4), 239(b), s 241(1), 268(1), 269(2), 272(2), 274, 277, 281
 Companies Winding-Up Rules 1972 rr 47, 48, 67, 68, 69, 70, 71, 72, 91, 92, 93, 94, 95, 96, 97, 98, 99
 National Land Code

- F** *Cheah Theam Kheng (Manokaran Sachpal Singh with him) (Megat Najmuddin Leong & Co) for the applicant.*
- G** *Shanti Morgan (SY Liew & LL Wong with her) (Shearn Delamore & Co) supporting the applicant (Equiticorp Holdings Sdn Bhd and Equiticorp Financial Services Ltd).*
Olivia Loh (Kenneth Feet with her) (Gananathan Loh) supporting the applicant (United Securities Sdn Bhd).
- H** *Robert Low (HL Looi & Helen Lim with him) (Ranjit Ooi & Robert Low) for the liquidator (Chuah Seong Phaik).*
Karen Lee (Wong Kian Kheong) supporting the liquidator (North Plaza Sdn Bhd).
Aw Ee Va (Skrine & Co) for the petitioner.

Hamid Sultan J:**I**

[1] This is my judgment in respect of the application (encl 27) of Cheah Theam Kheng as the creditor and/or contributory in the respondent ('City Centre Sdn Bhd') seeking an order for the removal of the liquidator Chuah

Seong Phaik ('Chuah') and the liquidator to be ordered personally to pay the creditor and/or contributory his costs of and incidental to this application. A

[2] It must be noted that the instant application was filed as early as 2005 and was delayed for nearly six years because of some unfinished business of the apex court and quite recently ie June 2011 Equiticorp Holdings Sdn Bhd and Equiticorp Financial Services Ltd ('Equiticorp') have filed a notice of motion (encl 227) to seek an order for the appointment of Robert Teo Keng Tuan to be liquidator of the respondent. Equiticorp is supporting the removal of Chuah. In addition United Securities Sdn Bhd (USSB) also supports the removal application, and they are all interested parties in respect of the winding up proceedings. B C

[3] The applicant has grounded his application on five grounds namely:

- (a) the appointed liquidator is unfit and not able to perform his duties impartially; D
- (b) the liquidator is in breach of his statutory duties;
- (c) the liquidator is in breach of his fiduciary duties; E
- (d) the liquidator is acting in conflict of interest; and
- (e) the liquidator is in contempt of court.

[4] The detailed adumbration is found in the supporting affidavit in encl 26. The common ground of complaint by the applicant, Equiticorp and USSB is that Chuah has failed to abide by the consent order of the court dated 26 July 2001 which specifically says that he has to act together with committee of inspection. The consent order in Bahasa Malaysia reads as follows: F

PERINTAH G

ATAS PERMOHONAN Pegawai Penerima dan Pelikuidasi Sementara DAN SETELAH MEMBACA Saman Untuk Menimbangkan Laporan Mesyuarat Pertama Pemiutang dan Penyumbang di bawah Seksyen 227 (2) dan Seksyen 241 Akta Syarikat 1965 dan Kaedah-Kaedah Penggulangan Syarikat, 1972 bertarikh 12hb Jun 2001 DAN SETELAH MENDENGAR Encik Azman Aiyub untuk Pegawai Penerima dan Pelikuidasi Sementara, Encik Surinder Singh Gill bagi pihak Lim Choon Hong, Cheah Theam Kheng dan sebagai pengarah sendiri dan untuk United Securities Sdn Bhd dan Cheah Theam Swee sebagai mewakili diri sendiri DENGAN PERSETUJUAN ADALAH DIPERINTAHKAN: H

- (1) Encik Chuah Seong Phaik dari Tetuan Paul Chuah & Co di lantik sebagai Pelikuidasi untuk City Centre Sdn Bhd bersama dengan Jawatankuasa Pemeriksaan. I

Bertarikh pada 26 haribulan Julai 2001.

A [5] The reason proffered by Chuah for non-appointment of committee of inspection was that there was insufficient fund to set up a committee of inspection. To this the applicant and others in essence say is unsatisfactory and unacceptable inter alia for the following reasons namely: (a) did not seek directions from court in relation to funds; and (b) was able to secure lawyers and property consultants etc; but did not find the means to comply with the court order.

C [6] It must be noted that, to say the property of the respondent, which is more than seven acres that too in the heart of Kuala Lumpur City with wide frontage along Raja Chulan, is not capable of producing income to meet with expenses to comply with the court order need to be considered in the right perspective. There is also a complaint by Equiticorp that the respondent's property is generating income from the car park and not accounted for. Learned counsel for Equiticorp in the submission says:

D 20. Whilst the liquidator was allegedly incapacitated by a lack of funds, it appears that the properties are generating a handsome income. The latest affidavit filed by Equiticorp discloses that a portion of the properties is being used for a carpark and fees are being collected for what appears to be close to 200 cars a day. A rough calculation puts the sum generated at RM172,800 a year and RM1.7 million for 10 years. The liquidator has filed Account of Receipts and Payments and Statement of the Position in the Winding-up for the last 10 years in which he enters nil receipts and payments suggesting he is either not accounting for those sums generated from the carpark or has neglected to collect those funds into the assets of CCSB.

E 21. It does not lie in the mouth of the liquidator to speak of lack of funds as the basis to breach the very court order authorising him to act on the one hand, then to incur costs in carrying out unsanctioned conduct and failing to collect income rightfully due to CCSM.

F 22. There is no rational basis for him to remain liquidator any longer.

G [7] The applicant has listed out a series of complaints against Chuah in the supporting affidavit and they can be, inter alia, summarised as follows: (a) failed to lodge adequate standing security with the official receiver; (b) failed to lodge with the official receiver an account of receipts and payments and a statement on status of winding up; (c) failed to take into custody the documents of title from the bank; and (d) acted in contempt of court when he placed the property for sale without the appointment of committee for inspection etc.

H [8] The parties have relied on the following cases: *Pace & Anor v Antlers Pty Ltd (in liq)* (1998) 26 ASCR 490; *Re Adam Eyton, Limited Ex parte Charlesworth* (1887) 36 Ch D 299; *Chi Liung Holdings Sdn Bhd v Soon Kok*

Seng (Pelikuidasi Chi Liung & Sons Sdn Bhd Dalam Penggulangan) [1996] MLJU 197; [1996] 3 CLJ 86; *Yap Cheng Hai v Yap Cheng Hai Feng Shui Center of Excellence Sdn Bhd* (unreported case, Suit No D3–28–821 of 2004); *Woodsville Sdn Bhd v Tein Ik Enterprise Sdn Bhd & Ors* [2000] MLJU 265; *Bydand Ltd v Mark Feldman & Co* [1998] EWCA Civ 74; *Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd* [1998] 6 MLJ 330; *SBF Builders Sdn Bhd v Bennes Engineering Sdn Bhd* [2009] MLJU 953; *Commissioner for Corporate Affairs v Harvey* [1980] VR 669; *Australian Securities and Investments Commission v Edge* [2007] VSC 170; *Re Handberg, Greight Pty Ltd (in liquidation)* (2006) 24 ACLC 323; *City & Suburban v Smith* (1998) 28 ACSR 328; *Re Rubber and Produce Investment Trust* (1915) 1 Ch D 382; *Re Sir John Moore Gold Mining Co* (1879) 12 LR Ch D 325; *Miharja Development Sdn Bhd & 8 Ors v Tan Sri Datuk Lay Mean Heong & 9 Ors and Another Case* [1995] 1 CLJ 523; *Re: Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, petitioners)* [1992] 1 MLJ 429; [1991] 3 CLJ 1762; *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (in liquidation)* [1998] 3 MLJ 820; *Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, interverner)* [2006] 7 MLJ 28; *Advance Housing v Newcastle Classic* (1994) 14 ACSR 230; *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567; *Re Goonal Pty Ltd (in liq)* (1977) 3 ACER 408; *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662; *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631; [2010] 1 CLJ 470; *Re Edennote Ltd* [1996] 2 BCLC 389; *Re George A Bond and Co* [1932] NSW 301; *Re Obie Pty Ltd (No 4)* [1983] 8 ACER 967; *Re Tea (1983) Ltd (receivers and managers appointed) (provisional liquidators appointed)* [1984] 2 ACLC 183; *Re Pacific Acceptance Corporation Ltd* [1977] 2 ACER 528; *Re Keith Morris Pty Ltd & Ors* [1971–1976] ACLC 28, 244; *Parmalat Capital Finance Ltd and others v Food Holdings Ltd (in liquidation) and another* [2008] UKPC 23; *Chua Boon Chin v JM McCormack & Ors* [1979] 2 MLJ 156; *Re Baron Cigarette Company Limited* (1912) TLR 394; *The King v Kysant (Lord)* [1932] 1 KB CCA 442; *Re Murray Engineering Company Limited* (1925) SC 330; *Re Anglesea Colliery Company* (1866) LR 555.

BRIEF FACTS

[9] The respondent was wound up on 25 April 2000 and official receiver was appointed as provisional liquidator of the respondent. On an application by the official receiver and after hearing the representatives, contributories and directors of USSB, the court, by consent, ordered Chuah with the committee of inspection as liquidator. Chuah proceeded to sell the properties of the respondent company but the Court of Appeal did not permit the sale.

[10] Learned counsel for Chuah has summarised the complaint as follows:

(9) Whilst the affidavit affirmed by CTK on 17.1.2005 (enclosure 26) filed in

- A** support of enclosure 27 raise several alleged bases supporting the removal of the liquidator, we note from CTK's submissions that CTK seeks only to rely on the following:
- (a) the liquidator has failed to constitute a committee of inspection in accordance with the appointment order;
- B** (b) the liquidator has acted in breach of statutory duty to settle the list of contributories and creditors;
- (c) the liquidator has failed to provide standing security pursuant to Section 228 of the Companies Act 1965;
- C** (d) the liquidator has failed to obtain the original titles for the lands from UOB Bank.

The remaining issues raised on affidavit are therefore deemed abandoned.

(10) Equiticorp and USSB appear to adopt the grounds canvassed by CTK.

- D** (11) The key contention common to CTK, Equiticorp and USSB surround the liquidator not having constituted a COI pursuant to Appointment Order prior to having entered into the SPA for the sale of the lands to North Plaza Sdn Bhd. The core complaint here is that in not constituting a COI prior to conducting a sale of the lands, the creditors and contributories have been denied an opportunity to dictate the manner the lands are to be realised.
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PRELIMINARIES

- F** [11] Learned counsel for Chuah says that under s 232(1) of the Companies Act 1965 ('CA 1965') a liquidator appointed by the court may resign, or on cause shown be removed by the court. And asserts that the removal of a liquidator is not a matter of pure judicial discretion and Chuah can only be removed by due cause shown. Learned counsel is in reliance of the following cases: (a) *Ng Yoke Gee & Anor*; (b) *Chi Liung Holdings Sdn Bhd*; (c) *Advance Housing Pty Ltd*; (d) *Abric Project Management & Anor*; (e) *Re Adam Eyton Limited, Ex Parte Charlesworth*; and (f) *Re George A Bond and Co*, has summarised the principles as follows:
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- (a) the court is to be satisfied on the evidence before it that it is against the interest of the liquidation for the liquidator to remain as liquidator. 'Interest of the liquidation' means all those who are interested in the company being liquidated.';
- H** (b) the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation, and to the purpose for which the liquidator is appointed;
- I** (c) there has to be a real and not merely theoretical possibility of conflict of interest before a liquidator is removed;
- (d) the onus is upon the applicant to show that 'the substantial and real interest of the liquidation' requires or justifies the removal of the liquidator in this case. The

applicant must therefore establish at least a 'prima facie case' that the removal of the liquidator would be for the general advantage of the persons interested in the liquidation;

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- (e) fair play to the liquidator himself is not to be let out of sight. Fair play to the liquidator may be the decisive factor in a case where there are no assets which could be imperiled by the continuance in office of the liquidator.

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- (f) the creditors' loss of confidence in the liquidator must be reasonable;

- (g) the court will not lightly remove its own officer and will, amongst other considerations, pay a due regard to the impact of removal on the liquidator's professional standing and reputation.

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- (h) as a matter of law, it is not sufficient ground for removal of a liquidator that a substantial minority, or even a majority of shareholders wants the liquidator removed. It is not a popularity contest.

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[12] Learned counsel also says that the proceeds of sales of land for the sum of RM158m which was set aside by the Court of Appeal is sufficient to settle the debts of the respondent company. The full submission of learned counsel is found in encl 248 and I do not wish to repeat the same. Learned counsel for the applicant, inter alia, says that:

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- (a) definition of 'on cause shown' will cover the consideration that the liquidator should be removed if it is in the interest of the liquidation. And relies on the case of *Re Adam Eyton, Limited Ex parte Charles-worth* at p 306 where the Bowen J of the Court of Appeal stated:

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definition of 'on cause shown' will cover the consideration that the liquidator should be removed if it is in the interest of the liquidation. And relies on the case of *Re Adam Eyton, Limited Ex parte Charles-worth* at p 306 where the Bowen J of the Court of Appeal stated:

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- (b) the question of fair play was dealt in the case of *Chua Boon Chin* where the court observed:

... in considering the question fairplay, I think the ball was at the liquidator's feet ...

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And asserts that the liquidator failed in the test of fair play as he did not comply with the court order. In addition say that the liquidator has been acting illegally;

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- (c) the liquidator for ten years did not hold a single meeting of creditors and/or contributories. And relies on the case of *Re Baron Cigarette Company Limited* where a liquidator did not convene meetings as required by law. The court (Swinfen Eady J) in the report states:

- A In His Lordship's opinion he had committed an irregularity in not convening the meetings of the shareholders as required by the Act and informing them of what had occurred. That he was at a loss what to tell them was no answer;
- B (d) on breach of statutory duties says: (i) in breach of rr 67 to 72 of the Companies Winding-Up Rules 1972, the liquidator has not settled the list of contributories; (ii) in breach of rr 91 – 99 the liquidator has not settled the list of creditors; (iii) in breach of s 228(a) of the CA 1965 and rr 47 and 48, the liquidator upon expiry of the initial security to the
- C official receiver did not have any standing security; and (iv) in breach of s 233 of the CA 1965, the liquidator failed to obtain the issue document of title from OUB Bank in Singapore;
- D (e) and says the above complaint also amounts to breach of fiduciary duties. And asserts the willful neglect to settle the list of creditors is mala fide, dishonest and in breach of the fiduciary duties owed to the creditors and/or contributories. And relies on the case of *SBF Builders Sdn Bhd* where the liquidator was removed essentially for faithfully failing to perform his duties; and
- E (f) and says the above clearly shows that the liquidator has been acting in contempt of court order, conflict of interest, breach of his fiduciaries duties, breach of statutory duties and is a person who is unfit and not able to perform his duties impartially.
- F [13] Learned counsel for Equiticorp grounds their complaint in a concise manner and, inter alia, says as follows:
- G (a) failure to comply with the consent order to act with committee of inspection affects his very authority to act as a liquidator. And proceeding to sell the properties is a serious breach. And relies on the case of *Woodville Sdn Bhd* where the court recognised the importance of committee of inspection and made the following observation:
- H [43] Peter himself admits in para 18 of his main affidavit that it was the creditors that had requested the liquidators for the appointment of COIs. The liquidators, therefore, by s 241(1) of the Companies Act 1965, were bound to summon meetings of the creditors and contributories for the purpose, and the appointment of the COIs became a statutory inevitability.
- I Since a COI consists of creditors and contributories or their agents [s 24(1)], the COI represents the entire body of creditors and contributories, in whose interest a company is wound up and the liquidator acts in the winding up.

[44] Section 241(1) says that the COI is 'to act with the liquidator'. A

liquidator can exercise his powers under s 236(1) only with the authority of the Court or of the COI. In that respect, the liquidator is subordinate to the COI.

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[45] One thing to note is that the COI, as is the general body of creditors and contributories, are not advisers to the liquidator. They are people, as representing the creditors and contributories, who have claims on the company. They are the master. The liquidator is to serve their interests. So they are empowered, as they naturally should be, to give directions to the liquidator. Directions are akin to orders, and a direction given when there is a right to give it is prima facie entitled to obedience. Section 237 does not go so far as to oblige a liquidator to obey the directions of the COI, but it requires the liquidators to 'have regard to' them. To have regard to them means to respect them and give them due consideration with a view to obeying them. Since the question is one of giving regard to directions, as opposed to advice, I would say that in law the liquidator is obliged to lean towards obeying them unless for good reasons he thinks they should not be obeyed. But in that case it would not be safe for them to simply proceed to act contrary to the directions. The safe course would be to summon a general meeting of the creditors and contributories under sub-s (2) to ascertain their wishes, and if these coincide with the directions of the COI which the liquidator feels should not be obeyed, then he should seek the directions of the court under sub-s (3).

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The point to appreciate is that if a liquidator complies with the directions of a COI or appears to lean towards complying with them, he is acting consistently with the intention of s 237. He would be acting contrary to s 237 if he were to treat the directions and wishes of the COI as of secondary importance and brush them aside in order to maintain an appearance of independence. Where the COI has a wish or gives a direction, the liquidator is not supposed to be independent and rely entirely on the use of his own discretion. He is supposed to first of all have regard to the wish or direction of the COI. I use the word 'wish' because, in my opinion, a direction of the COI need not, for the purposes of s 237(1), appear as a direction. A wish of the COI is a direction to the liquidator. Their wish is his command;

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(b) and relies on the case of *Bydand Limited* where the liquidator failed to comply with the order of court requiring him to furnish evidence that he was duly authorised to continue with an action on behalf of a company in liquidation. And says (i) he failed to convene the creditors' meeting to get a liquidation committee appointed to give the necessary consent, (ii) the court dismissed the action on the ground that the liquidator had no authority to continue the action. And asserts that in the instant case every action that the liquidator has been without authority (not having acted with a committee of inspection) and having been in office for ten years and having incurred fees and expenses in that period, there is every reason to have the liquidator removed;

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(c) and relies on the case of *Kong Long Huat Chemicals Sdn Bhd* which stands

A for the principle that if the appointment of liquidator is premature, the order for such appointment was tainted with illegality and thus void;

(d) and relies on the case of *SBF Builders Sdn Bhd* where the liquidator failed to submit to the committee of inspection any documents or records including the record book and cash book. The court held that it may remove the liquidator if there is a misconduct under s 277 of the CA 1965:

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C Now, an order under s 277(2) and (4) Companies Act 1965 allows the court to take cognisance of the conduct of the liquidator. If a contributory or any of the persons named in the provision complain that the liquidator has not faithfully performed his duties and observed the prescribed requirements the court may 'inquire into the matter and take such action as it thinks fit'. In the actions available, 'the Court may at any time require any liquidator to answer any inquiry in relation to the winding-up and may examine him or any other person on oath concerning the winding-up and may direct an investigation to be made of the books and vouchers of the liquidator'. In short, if there is misconduct, a liquidator may be removed.

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E And also says that the above ex parte order granted to remove the liquidator was set aside on other grounds (non-disclosure of material facts);

(e) and says the only reason put forward by the liquidator for failing to appoint or act with a committee of inspection is the lack of funds of the respondent and yet the liquidator incurred costs and fees paying for two tender exercises (including the costs of the valuation reports and advertisements in newspapers) and for legal proceedings in the High Court, Court of Appeal and now Federal Court to endorse a sale which is not beneficial to the creditors and/or contributories of the respondent (the property price having appreciated over the past four years);

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(f) and says (i) whilst incurring fees and expenses in litigation, the liquidator did not deem it appropriate to seek directions of the court with respect to its alleged inability (by reason of lack of funds) to appoint the committee of inspection, (ii) whilst the liquidator was allegedly incapacitated by a lack of funds, it appears that the properties are generating a handsome income. (iii) the latest affidavit filed by Equiticorp discloses that a portion of the properties is being used for a carpark and fees are being collected for what appears to be close to 200 cars a day. (iv) a rough calculation puts the sum generated at RM172,800 a year and RM1.7m for ten years, (v) the liquidator has filed 'Account Of Receipts And Payments And Statement Of The Position In The Winding-Up' for the past ten years in which he has entered nil receipts and payments suggesting he is either not accounting those sums generated from the car park or has neglected to collect those funds into the assets of CCSB;

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- (g) asserts that the majority of the creditors and the sole contributory support the removal application; and A
- (h) says the properties are believed to be worth, far in excess of RM158m, and upon paying the creditors there may be a portion of sale proceeds to be returned to the contributories. B

[14] Finally learned counsel concludes by saying the attempt to sell the valuable assets in breach of the consent order and the duty as a liquidator places the liquidator to be unfit person for the office and ought to be removed. Learned counsel for USSB has placed a similar line of submission which could be found in the submission of the applicant as well as Equiticorp's. In consequence I shall not repeat the same. C

[15] I have read the application, affidavits and the submission of the parties in detail. I am grateful to learned counsel for their comprehensive submission. I do not wish to repeat the same save to deal with the core issues and some related matters to stand as guidance for just, expeditious and economical conclusion of liquidation process, taking into consideration, encl 227 for the appointment of a new liquidator is pending before me for hearing. After having given much consideration to learned counsel for Chuah I take the view the application to remove Chuah as liquidator must be allowed with appropriate directions. My reasons, inter alia, are as follows: D

- (a) as early as 19th century it was well recognised that a liquidator was a representative for some purpose of the creditors and/or contributories. The learned author of *Iyengar's Companies — Winding-up*, (2nd Ed), at p 88 makes the following observations: E

The position of a liquidator, therefore, seems to be that though he is not exactly a trustee, he occupies a fiduciary position (see *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167). F

As is the case with the directors, it is difficult to state succinctly or accurately the position occupied by a liquidator nor is it exactly defined in the Act and the position has to be inferred from the powers and duties vested in and cast upon the liquidator under the Act. Observations will be found in cases that the liquidator is a trustee for the creditor or in the case of a solvent company for the contributories. The assets are fixed by the statute with a trust for equal distribution among the creditors (see *Re Oriental Inland Steam Co* (1874) 9 Ch 559; There is imposed on the assets a trust to be applied in discharge of the liabilities of the company (see *Delhi Bank's case* (1871) 15 Sol J 923; In *Black & Co's case* (1873) 8 Ch 254, Lord Selborne observes: G

The hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable distribution of the assets. H

In *Silver Valley Mines* (1882) 21 Ch D 381, Cotton LJ observes as follows at p 392: I

A A liquidator is a person having a prima facie right to costs (out of the estate), but he is not in the ordinary sense a trustee. He is a person appointed by the court to do a certain class of things.

Romer J has said (*Knowles v Scott* (1891) 1 Ch 721 at p 723):

B In my opinion the liquidator is not a trustee in the strict sense the agent of the company — an agent who has no doubt case upon him by statute or otherwise special duties, amongst which may be mentioned the duty of applying the company's assets, in paying creditors and distributing the surplus among the shareholders.

C The liquidator occupies a fiduciary position and must not make a secret profit out of his position (see *Silkstone and Haigh Moor Coal Co*). It is submitted that he has all the duties an agent would have. He will only be an agent of the company and therefore not liable to third parties, even though they be creditors or contributories, for misconduct (*Knowles v Scotts*). If, however, the liquidator has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, he can be brought to account by any creditor or contributory on a summons; but this will not enable a contributory who has accidentally been omitted in a distribution of assets to proceed by summons against the liquidator to obtain his due proportion of the assets (see *Re Hill's Waterfall Estate and Gold Mining Co* (1896) 1 Ch 947).

E The liquidator represents creditors and contributories alike, and should bear an even hand between them. He should afford reasonable assistance and facilities to persons seeking information to enforce their rights (see *Re Sir John Moore Gold Mining Co* (1879) 12 Ch D 328).

F The liquidator being an officer of court — will be directed to deal fairly (see *Re Regent Finance and Guarantee Corporation* (1930) WN 84), eg he may be ordered to repay moneys paid to him under a mistake of law (*Re Opera, In re* (1891) 3 Ch 260;

G (b) it must be observed from the decision of *Woodsville Sdn Bhd* that the liquidator is in fact a servant to the committee of inspection subject to his professional role to protect the interest of creditors and/or contributories. If a liquidator, misconduct himself and/or misappropriate property in the winding up process the creditors and/or contributories can seek direction from the court to lodge police complaint. Being officers of court does not mean they are excluded from the criminal law, and it will be prudent if such reports are lodged with the commercial crime for it to be effectively dealt with, rather than just complain to the court per se on the 'parking issue' even though it is relevant consideration for the removal application;

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(c) courts have often widened the scope of duty of liquidators for the benefit of creditors and/or contributories according to the facts and circumstances of the case. The learned authors Shanthy Rachagan, Janine

Pascoe, Amil Joshi, (2002), *Principles of Company Law in Malaysia* at pp 689–671 make the following observations: A

The Federal Court of Australia has also held that a liquidator may be liable for breach of the duty of care and skill, by failing to bring the company out of liquidation as soon as reasonably practicable when it had become solvent; *Pace v Antlers Pty Ltd* (1998) 16 ACLC 261. B

Whilst s 237(4) permits liquidators to use their own discretion in the management of the affairs and property of the company and the distribution of its property, they are nevertheless under a fiduciary duty to act honestly and to exercise a reasonable degree of care and diligence. C Where a liquidator is paid professionally, he or she should observe a high standard of care and skill, commensurate with his or her professional standing; *Vasudevan v ICAB Pte Ltd* [1987] 2 MLJ 563. However, as noted above in *Re Choong Khiaw Realty Co Sdn Bhd* [1976] 2 MLJ 73, the Federal Court held that a liquidator does not breach his or her duty in failing to recover funds paid in good faith. D

A liquidator is also required to act impartially in the conduct of the winding up and comply with the provision of the Act. If difficulties arise, the liquidator is under a duty to seek the directions of the court: s 237(3).

In the Australian case of Commissioner for *Corporate Affairs v Harvey* [1980] VR 669, a liquidator was found to have been in breach of his duties in a large number of respects. He failed to deposit the company's money in the liquidation trust account and to lodge accounts with the Commission. He dishonestly used the company's funds to make unauthorised payments to his firm. In some instances he used the company's funds for personal expenses unconnected with the liquidation. The court also found that Harvey delegated his powers to unsupervised employees and failed to seek the court's directions on controversial issues. He generally failed to act in the interest of the company, its contributories or creditors. The court ordered that Harvey make up the deficiency of two insolvent companies he was liquidating. Marks J explained the general duties of a liquidator appointed in a compulsory winding up in the following terms: E

The duties of a liquidator need to be clearly understood. Fundamentally, he must administer the estate strictly in accordance with the duties and obligation specifically imposed on him by the Companies Act and its Rules. It is obvious that everything to be done in a competent administration is not and cannot be specifically prescribed. Preserving the assets, giving proper attention to the administration, acting with due dispatch and ensuring adequate knowledge and understanding of the affairs of the companies are matters of commonsense. If there is a difficulty at any stage of the administration then it is the clear duty of the liquidator to inform the court and take directions. F

In a compulsory winding up his office stems from appointment by the court. He is clearly not an employee of the court but the nature of the G

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A appointment makes him a representative of it. As Street J said in *Dully v Super Centre development Corp Ltd* [1967] 1NSWR 382 at p 383, the decisions the liquidator makes from time-to-time are in effect made under the authority of the court itself. The winding up is by the court, which for the purposes the liquidator is. As such he is entrusted with the reputation of the court for impartial and proper dispatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge.

B When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust, which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the court.

C The law in the circumstances regards such duties as fiduciary, although clearly it will not interfere with bona fide exercise of discretions which are not beyond the acts or omissions of a reasonable person.

D In *Re Ah Toy* (1986) 4 ACLC 480, the Supreme Court of the Northern Territory considered whether a provisional liquidator was liable under the Australian Uniform Companies Act 1961 equivalent of s 277 to make good losses caused by his negligent management of the liquidation. A partner of Price Waterhouse in the Northern Territory advised the company's shareholders that it should be placed in the liquidation. The partner arranged for Ah Toy, an official liquidator, to be appointed as the company's provisional liquidator on the basis that Price Waterhouse did most of the work. The company was subsequently placed in liquidation and Ah Toy was nominated as its liquidator. Ah Toy accepted and appointed Price Waterhouse as his agent. Major decisions and most of the liquidation work will done without Ah Toy's involvement.

E The court held that Ah Toy did not have power to appoint Price Waterhouse as his agent in the way in which he had done. While provisions such as the then Australian equivalent of s 236(2)(i) permitted a liquidator to appoint agents, it did not authorise 'wholesale delegation'. Liquidators are appointed on the strength of their personal qualifications and are personally accountable for their work. Toohey, Marling and Wilcox JJ in a joint judgment stated that 'in their work they must reply to some extent upon others but it is important that they bring their personal skills and experience to all significant aspects of the liquidation.'

F (d) courts generally will not interfere with exercise of discretion of the liquidator unless the decision of the liquidator is such that no reasonable man, properly instructed in the circumstances, could have arrived at it.

G Section 237(4) of the CA 1965 specifically states:

I Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

That does not mean that the liquidator can breach the provision of s 236(1) of the CA 1965 etc; which is meant to be exclusively for the protection of the creditors and/or contributories. However, if the liquidator is in breach of his duty there are number of remedies available. Some of them are as follows:

- (a) may be sued for breach of common law duty of care;
- (b) liability to account for profit for acting in breach of fiduciary duty;
- (c) costs of litigation may be disallowed if he engages without good reasons on fruitless legal proceedings; and
- (d) court may deprive the remuneration on account of any breach of duty committed,

(see Mcpherson — *The Law of Company Liquidation* (4th Ed) at pp 394–399);

statutory breach per se is not a ground unless it is contumelious in nature and or has prejudiced the liquidation process. However, the court is in no position to condone statutory breach save that it can only refer the matter to the official receiver or registrar of companies or other relevant bodies to prosecute if they deem it fit. In *Ng Yok Gee* Ramly J (as he then was) observed:

The accounts were submitted with the Registrar of Companies periodically as required. The fact that the accounts may have been lodged a few days late does not in any way prejudice the liquidation. At most, it is a technical breach of s 281 of the Companies Act 1965 which is then a matter for the Registrar of Companies to pursue, if they so wish.

Further, the learned judge in that case set out some of the circumstances which can prompt the court to remove the liquidator. The court observed as follows:

For convenience, the court, set out below the relevant legal principles applicable to an application to remove a liquidator:

- (a) A liquidator appointed by the court can only be removed by the court ‘on cause shown’ — s 232 of the Companies Act 1965.
- (b) The court does not have an unfettered discretion as ‘cause must be shown’. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.
- (c) The normal ground for removal is that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict. See:

- (i) In *re Sir John Moore Gold Mining* (1879) 12 Ch Div 325, at p 331;

- A (ii) *Advance Housing v Newcastle Classic Developments* (1994) 12 ACLC 701; and
- (iii) *Commonwealth of Australia v O'Reilly* (1984) 52 ALR 031.
- B (d) As to what constitutes a conflict of interest, there has to be a real and not merely theoretical possibility of conflict before a liquidator can be removed (*Advanced Housing*).
- (e) A liquidator may act even though there has been a prior involvement with the company, provided that the involvement is unlikely to impede the liquidator from acting impartially (*Advanced Housing*).
- C (f) In *Advanced Housing* there was an actual conflict because the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.
- D (g) It is an integral part of a liquidator's duty to investigate the affairs of the company from its foundation onwards (*Commonwealth of Australia v O'Reilly*).
- (h) A liquidator who fails to investigate the affairs of the company to the prejudice of an applicant is in neglect of his duty and can be removed (see *In re Sir John Moore Gold Mining Company*).
- E (i) It cannot be a ground for removal that a liquidator is carrying out his duty to investigate the affairs of the company, even though some interested parties may object.
- F (j) In a case where the application for removal is by a creditor, all the creditors must be given notice of the application or it must be shown conclusively that the removal is for the benefit of all creditors (see *In re White Cliffs Dredging Co* (1893) 11 NZLR 711).
- (k) A liquidator is not bound to pursue a claim on behalf of the company, unless he believes that it has a reasonable prospect of success (see *In re George A Bond and Company Ltd* (1932) SR (NSW) 301).
- G (l) Where there are no assets which can be imperiled by the continuance in office, fair play to the liquidator may be the decisive factor (see *In re George Bond*).
- H (m) Fair play to the liquidator is not to be left out of sight. (*Chua Boon Chin v JM McCormack & Ors* [1979] 2 MLJ 156 at p 158).
- (n) In *Adam Eyton Limited; Ex parte Charlesworth* (1887) 36 Ch Div 299, the applicant for removal of liquidator was required to give an undertaking to pay all costs and expenses of the liquidator on solicitor and client basis;
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it is not in all instances where the liquidator has erred that the court will remove him. In *Procam (Pte) Ltd v Nangle & Anor* [1990] 3 MLJ 269 Thean J refused to remove the liquidator even though the liquidator has erred, on the grounds that the errors were made in good faith;

if the liquidator for any reason is constrained from continuing with the liquidation process the law does not prohibit him from resigning (see ss 232(1) and 239(b) of the CA 1965). However, he cannot base lack of funds as a reason for not proceeding with the liquidation process expeditiously when he has voluntarily accepted the role;

it is trite that the liquidator's main role in winding up proceedings is to wind up the business of the company, realise the assets to pay off the creditors and other dues and ultimately in a solvent company to return the balance to the members and bring an end to the liquidation process. CA 1965 imposes on the court a duty to interfere when there is a threat of justice, equity and good conscience likely to be compromised by the conduct of the liquidator. The liquidator is under a duty to use his skill, diligence, competence and knowledge properly attributable to a professional person, and if he so acts, he has fulfilled his duty. A high standard of care is required from a liquidator. It will be prudent for a liquidator in every case of serious doubt or difficulty in relation to the performance of his duties, to submit to the court for its guidance as he must not forget he also has a status of an officer of court and the court, as a privilege to his office, does not allow any person to interfere in his work generally without leave of court. In *Torita Rubber Works* I made the following observations:

- (e) I will go to the extent of saying where the company is solvent, the liquidator has no right to reject a lawful claim as s 269(2) of the CA 1965 specifically says the liquidator must pay the debts of the company. And if he does not do so, he is at the peril of being sued and probably be liable in negligence if distribution has taken place (see in *Re Home and Colonial Insurance Co Ltd* [1930] 1 Ch 102). In all cases inclusive of insolvent company where the liquidator takes the view the claim is not maintainable he may ask proper directions from court naming the relevant parties or request the creditor or claimant to seek appropriate directions from the court etc; all this will be within his powers and duties entrusted in s 269 to be read with s 236 of the CA 1965. In essence the Companies Act or Winding-Up Rules does not encourage any form of high handedness by the liquidator. Courts will not ordinarily entertain such conduct, as s 274 of the CA 1965 is specifically enacted, inter alia, to arrest high handed conduct of liquidator. And that section reads as follows:

274 Application to Court to have questions determined or powers exercised

- (2) The liquidator or any contributory or creditor may apply to the Court —
- (a) to determine any question arising in the winding up of a company;

- A (b) to exercise all or any powers which the Court might exercise if the company were being wound up by the Court.
- (3) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.
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- C (f) This section in my view to some extent has dealt away with the common law position that courts will be reluctant to interfere with the decision of the liquidator. The statute imposes on the court a duty to interfere when there is a threat of justice, equity and good conscience likely to be compromised by the conduct of the liquidator. The liquidator is under a duty to use his skill, diligence, competence, and knowledge properly attributable to a professional person, and if he so acts, he has fulfilled the statutory duty but that does not necessarily mean the court has no powers to interfere pursuant to s 274 of the CA 1965, but ordinarily it will not do so. It must be emphasised here that a high standard of care is required from a liquidator, since by accepting office, he undertakes duties for reward. It will be always prudent for a liquidator in every case of serious doubt or difficulty in relation to performance of his statutory duties, to submit the matter to court and to obtain its guidance (see *In Re Home and Colonial Co Ltd* [1930] 1 Ch 102). In *Re Lubin, Rosen and Associates Ltd* [1987] 1 WLR 93, it was held that it is undesirable for a voluntary liquidator to take steps which appear to be designed to secure support for himself and be discouraging to creditors who take a contrary view. A voluntary liquidator ought not to even give the appearance of being one-sided in such matters. A liquidator who does this at least exposes himself to the comment that he does not seem to have full appreciation of his position. The Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 was critical when the trial judge had relied on the liquidator and the liquidator seemed to have sided with the respondent where the liquidator has failed to consider the appellant's right ie her right to share in the company surplus assets etc; Mohamed Dzaiddin FCJ (as he then was) observed:
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- G according to counsel, the duty of the liquidator was to act impartially and to draw the attention of the court to facts and matters which were material for the court's consideration. We would agree with the above proposition. In *Gooch's* case (1872) 7 Ch App 207, it was stated that of the most importance that the liquidator should ... maintain an even and impartial hand between all individuals whose interests are individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatsoever.
- H
- I From the Federal Court decision, it is quiet clear that a person who holds the status of liquidator, or any persons or its like, whether or not appointed by court, for reward, has a high standard to meet and the court will not ordinarily take the common law position that court will be reluctant to interfere with the decision of such persons.;

to check any form of high handedness of the liquidator and to safeguard creditors and/or contributories, it is well provided for in several provision of *CA 1965*. It is only that that the solicitors for the creditors and/or contributories do not make use of these provisions to confront the liquidator at the time of the appointment itself as the court is vested with absolute powers to make appropriate orders and directions to ensure the liquidation process is brought to an end justly, expeditiously and economically taking into consideration the paramount interest of the creditors and/or contributories. To ensure the paramount interest of the creditors and/or contributories and to demonstrate to court that, at all material time the liquidator is acting professionally, there must be total transparency of the conduct and action of the liquidator. The transparency aspect, inter alia, may be satisfied if appropriate meeting and information are provided to the creditors and/or contributories and statutory procedure and administrative requirements are diligently complied with; and where there is a dispute to direct the creditors and/or contributories to seek appropriate directions of court or in cases where substantial assets, more importantly, if landed properties are to be sold, to get appropriate sanction of the court with due notice to the relevant parties;

it must be noted that *CA 1965* does not permit the liquidator to act as though he is the absolute owner of the property. This is specifically spelled out in s 236(1) of the *CA 1965* which reads as follows:

- (1) The liquidator may with the authority either of the Court or of the committee of inspection:
- (a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;
 - (b) subject to section 292 pay any class of creditors in full;
 - (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
 - (d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

- A (e) appoint an advocate to assist him in his duties.;

B It must be noted that s 236 is meant to protect the interest of creditors and/or contributories in all matters stated therein and in particular the disposal of the assets of the company and appointment of advocate to assist him in his duties. The court has to be vigilant in dealing with the above provision and is not permitted to give 'omnibus orders' to empower the liquidator with status of absolute owner. Each and every order requested pursuant to s 236(1) needs to be scrutinised by the court, and as far as practical, obtain the views of the creditors and/or contributories to ensure any form of potential disputes are arrested at *limine* to ensure just, expeditious and economical conclusion of the liquidation process.

C In fact even the issue of liquidator's fees or advocate's fees or even solicitor's fees at the earliest opportunity must be dealt with by the liquidator and obtain appropriate sanction from the creditors and/or contributories and where the fees cannot be agreed, to seek appropriate direction from the court to avoid unnecessary disputes and litigation which will slow down the just, expeditious and economical conclusion of the liquidation process. In fact I will go to the extent of saying that a liquidator who does not deal with the issue of fees at the earliest opportunity and thereafter raises bills which are objected to by creditors and/or contributories may not obtain the sanction of court on the disputed items unless provided for in the Act or Rules as it will be caught by s 236 and also create a situation of conflict of interest and/or breach of fiduciary duty which a professional person and/or officer of court must avoid if he has opportunity to do so (see s 232(3) of the CA 1965).

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G The learned author Walter Woon, (2nd Ed), of *Company Law* at pp 704–722 has concisely dealt with role, duty, obligations, limitations etc relating to liquidators. I have taken the liberty to summarise some of the relevant parts for the purpose of the instant application. It reads as follows:

- (i) a liquidator has two sets of powers; those he may exercise in his own discretion (see s 236(2) of the CA 1965) and those that require the approval of some other body (see s 236(1) of the CA 1965);
- H (ii) a creditor or contributory who is dissatisfied with conduct of the liquidator may complain to the court which can inquire into the matter (see s 272(2) of the CA 1965);
- I (iii) some of the functions of the liquidator's powers are exercisable only with the authority of the court or of the committee of inspection;
- (iv) the function of the committee of inspection is to supervise the liquidator;
- (v) the acts of a liquidator are valid notwithstanding any defect that

may subsequently be found in his appointment or qualification (ss 232(8) and 268 (1) of the CA 1965);

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(vi) cause may be shown where there is some unfitness of the person by reason of his personal character, or from his connection with other parties or from the circumstances in which he is mixed up;

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(vii) it is not necessary to establish misconduct in order to remove the liquidator; it can be done so on the ground that it is in the interest of the liquidation that he should be replaced; and

(viii) the court may decline to remove a liquidator if it is not in the interest of the liquidation not to do so.;

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it is trite the court has been empowered with wide discretion to remove the liquidator on cause shown. There is no specific methodology or formula attached to the word 'cause shown'. The court is obliged to remove the liquidator in limine if he has failed to act within the spirit and intent of the several provisions of the CA 1965 and more importantly when he acts outside the scope of his appointment or order of court or failed to protect the interest of the creditors and/or contributories or is not justly, expeditiously and economically pursuing to conclude the liquidation process as it must not be forgotten that he is an officer of court and his acts or omission must not place the administration of justice to disrepute. For this purpose CA 1965 has placed many sanction mechanism to deal with act and omission detrimental to the just, expeditious and economical conclusion of the liquidation process and that does not mean he must be removed for every act or default. It all depends on the seriousness of the act or omission;

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in the instant case there are several complaints and sufficient evidence to attract the provision of s 232(1) of the CA 1965. The liquidator has not, inter alia, diligently acted on the security requirement, failed to obtain the sanction of the creditors and/or contributories, omitted to exercise his statutory duties, failed to seek appropriate directions from the court for just, expeditious and economical disposal of the liquidation process, notwithstanding the winding up order was made some ten years ago and substantial assets worth about ¼ billion has not been satisfactorily dealt with. Very importantly the liquidator in the instant case being an officer of court was in gross contempt and/or disrespect to the order of court when he proceeded to act in the liquidation process in the absence of committee of inspection. In doing so he has exposed himself to personal liability and he may not only be liable to the creditors and/or contributories but also to other service providers whom he had appointed and now will not be able to be indemnified from the assets of the respondent company as the protective sections in ss 232(8), 268(1) of the CA 1965 etc may not apply if the act done was in breach of a court order.

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A Regrettably, Chuah by not complying with the court order may have placed his position equivalent to a tortfeasor and/or de son tort. In addition, such contempt must be taken cognisance by official receiver and appropriate investigation of the liquidation process must be made and informed to the relevant ministry which gave license to the liquidator

B to take necessary action. Contempt of court order by liquidator who is officer of court must be severely dealt with and the relevant authorities and/or creditors and/or contributories must act to arrest such conduct in *limine*. Section 229 deals with this area of jurisprudence and reads as follows:

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- (1) Where in the winding up of a company by the Court a person other than the Official Receiver is the liquidator, the Official Receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties, or if any complaint is made to the Official Receiver by any creditor or contributory in regard thereto, the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient.
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- (2) The Official Receiver may at any time require any such liquidator of a company which is being wound up by the Court to answer any inquiry in relation to any winding up in which he is engaged, and may, if the Official Receiver thinks fit, apply to the Court to examine him or any other person on oath concerning the winding up.
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- (3) The Official Receiver may also direct a local investigation to be made of the books and vouchers of such liquidator.
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In fact I will say *CA 1965* should be amended to provide for a representative of the official receiver to be appointed in the committee of inspection in all cases where a private liquidator is appointed and provision to be made for a percentage of fees to be paid to the official receiver or his representative for better and effective management of the liquidation process as well as to enforce the statutory provisions diligently;

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it is extremely important for the court, official receiver, creditor and/or contributory at the first instance itself to exercise due care and diligence in the selection process of the liquidator, the scope of his duty, the time frame for the liquidation process etc; to avoid any dispute which may burden the administration of justice and lead to protracted conclusion of the liquidation process (see *Re John Wiper Ltd* (1972) 22 FLR 206);

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it will appear that the court has a duty to consider the appointment of committee of inspection when private liquidator is appointed to deal with assets of substantial value. The learned authors of McPherson — *The Law of Company Liquidation*, (4th Ed) by Andrew Keay at pp

324–325 makes the following observation:

In complex liquidations in which there is likely to be controversy or substantial litigation the liquidator may even request a committee. This will enable the liquidator to obtain advice and support.

The committee is usually composed of creditors or contributories, but it may include persons holding general powers of attorney from creditors or contributories or special authorities authorizing them to act on the committee. Very often some of the committee members will be representative of distinct interests or classes within the general meeting the proportion of creditors to contributories being settled by agreement, or in case of difference, by the court. There is no prescribed upper limit on the number of committee members, but the Corporation Law inferentially requires a minimum of two, for if there are less than two members the committee cannot act. A committee will usually not consist of more than five members; otherwise it could become too unwieldy.

The court has no express power to interfere with the composition of a validity appointed committee, but in exercising its general powers in relation to winding up, the court should have regard to influencing the composition so that no creditor or class of creditors with a substantial interest is excluded from the representation which it seeks.

in my view a private liquidator should not be appointed in the first instance on the day of the hearing of the winding up. When the company is wound up on creditor's petition or like, the official receiver must be appointed as the provisional liquidator with directions for him to deal with all the above items before a private liquidator is appointed at the request of the parties;

on the facts of the instant case I am satisfied that the liquidator, must be removed and I agree with the submission of the parties for the removal. Upon making such an order I am also obliged to fill the vacancy pursuant to s 227(6) of the CA 1965. In addition I am obliged to direct necessary investigation in respect of the necessary complaint made by the creditors and/or contributories pursuant to s 277(2) of the CA 1965 which reads as follows:

The Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

- A I am also mindful of Equiticorp's notice of motion to appoint their preferred candidate to be the liquidator. That application has not been heard yet. It will be prudent for the court at this stage to appoint the official receiver as the liquidator and give appropriate directions to facilitate just, expeditious and economical conclusion of the liquidation process.
- B The court must not appoint a private liquidator or be rushed by the official receiver, creditor or contributory to appoint a private liquidator without obtaining the agreement as to fees, the methodology of disposal of assets, time frame for conclusion of liquidation process and the relevant costs involved and also to ensure committee of inspection is in place. Solicitors acting for creditors or contributories must be vigilant on this aspect in the first instance itself when an agreement can be reached with the liquidator as to his terms of appointment and suitable sanction mechanism such as reduction of fees, resignation, removal etc; to avoid any subsequent disputes;
- D in my view an early and economical conclusion of liquidation process may take place if more than one liquidator is appointed in the instant case and this is provided for in s 227(6) of the CA 1965. Quite recently Justice Lee Swee Seng in the case of *Hiew Kiang Hoe & Anor v Shencourt Properties Sdn Bhd* [2011] 7 CLJ 158, where there was an application for the removal of liquidator, directed an additional liquidator to be appointed. This is a step in a right direction as many liquidation processes by professional liquidator have been slow and it is perceived to be that the liquidator attempts to benefit from the slow and acrimonious litigation in terms of fees as well as de facto ownership of the assets of the wound up company as well as undisclosed revenue. In fact there has been a number of acrimonious litigation by the liquidator and the creditor and/or contributory all directed to lack of bona fide and/or transparency of the liquidation process, reported in law journals and the liquidation process taking decades or at time it will appear that it will take generations to complete to the advantage of the liquidator if it involves substantial asset as he enjoys the capacity of de facto owner in the exclusion of the creditor and contributory. CA 1965 does not at all encourage such practice by the liquidator and a well-placed committee of inspection will be able to check any high handedness as well as avoidable litigation by the liquidator for early conclusion of the liquidation process. The liquidator is required to be impartial, listen to the concern of the creditors and/or contributories and where necessary, obtain directions from court or direct the objecting party to seek appropriate direction. In fact if at all there is a dispute as to how the liquidation process should continue, the contest should be between the creditors and/or contributories and not the liquidator. The liquidator being officer of court ought to be neutral and invite the court to give suitable directions for him to proceed after hearing the objecting parties. The scheme of CA 1965 only allows the liquidator to obtain
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appropriate directions and not to take the dispute to apex court if the decision is not in favour of the liquidator as it may protract the liquidation process. However, the affected creditor and/or contributory is not prohibited from exhausting the remedy;

as I said earlier to avoid any dispute, the liquidator should in the first creditors' meeting, place an estimate of the fees for the liquidation process and the time required to complete the liquidation process and the method or procedure which will be employed for the sale of the assets. Once an agreement has been reached it will avoid any unnecessary dispute relating to the delay in the liquidation process itself, and any suspicion that the liquidator is unnecessarily delaying the process for extraneous rewards as in the instant case, inter alia, will show in relation to the 'parking issue'. In addition I must say that if the assets to be dealt with are substantial, it will be prudent to appoint more than one liquidator to safeguard the interest of creditors and/or contributories. It may be that the company may be insolvent at the time of winding up and over the years the value of the assets may have appreciated and in consequence the contributory may feel his interest is not sufficiently protected by the liquidator. All this will cause unnecessary litigation. In my view when there are substantial assets as in this case amounting to about ¼ billion the liquidator may be appointed by the creditors and/or contributories seeking appropriate directions from the court to appoint additional liquidator to be independent from being appointed by creditors and/or contributories. The court could seek the assistance of reputable institution like the Bar Council and/or KLRCA to nominate suitable names for the appointment of additional liquidator and thereafter parties can agree to the scope of work of the liquidators as well as proportionate fees and the timeframe for the completion of liquidation process to avoid any form of complaint of high handedness in the liquidation process;

in my view to avoid unnecessary litigation in liquidation process the court when appointing the liquidator other than official receiver must diligently, inter alia, ensure that:

- (i) provision is made for committee of inspection;
- (ii) the time for the conclusion of the liquidation process is strictly agreed by the parties with the proposed liquidator;
- (iii) the remuneration of the liquidator as well as the anticipated fees structures for other parties such as advocate and solicitor etc; has been agreed in writing with the liquidator;
- (iv) where movable and immovable properties are required to be sold to agree with the parties the fair procedure, methodology and

- A timeframe for the sale ie by tender, auction, sale through court following the National Land Code procedure etc as far as possible;
- (v) where scope of work consists of sale of property and recovery actions, separate time period as well as payment for first dividend to creditors to be agreed. For example, if properties are to be sold, a reasonable time frame may be one to three years and upon the proceeds received, dividends can be paid to the creditors and contributories as the case may be. If it is a recovery proceeding, and or claim against director for breach of fiduciary duty etc; a longer time frame may be needed, for recovery as well as payment of dividends; and
- (vi) if there are assets of the liquidation process which are substantial, then more than one liquidator may be appointed and the additional liquidators may be nominated by neutral bodies as suggested earlier and the scope and fees for additional liquidators to be agreed by parties inclusive of the timeframe, specific role of each liquidator and the procedure and methodology of sale of the assets.
- E [16] In fact I will go to the extent of saying that the official receiver must take immediate steps to consult the relevant bodies to issue practice directions to say that when the court appoints a private liquidator it must be satisfied the above issues stated in para (u)(i) to (vi) have been agreed by the creditors and/or contributories and the proposed liquidator has agreed to the terms. This is essential to avoid unnecessary disputes and appeals and also for just, expeditious and economical disposal of the liquidation process.
- G [17] *En passant* I will say that it is time practitioners involved in the liquidation process move the official receiver, or Attorney General Chambers, Bar Council etc; for the proposal stated in paras (u)(i) to (vi) to be endorsed by way of practice directions; and to have practice directions to be issued to hear application relating to liquidation process to be heard within three months of filing in court and if there is an appeal to the appellate courts to have them disposed within three months for expeditious and economical conclusion of liquidation process. This is necessary in public interest as many reported cases will show that there has been substantial delay in bringing liquidation process to conclusion and this directly or indirectly affects the economy of the country, employment opportunity, generation of wealth, income and finally loss of tax revenue. For example, in the instant case properties worth ¼ billion is standing as idle land in the heart of the city for the last ten years without any economic benefit to the society. If the liquidation process has been dealt with expeditiously there would have been lot of economic activities in the land which would have generated more working opportunities, income and
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substantial revenue for the tax department. There are many properties which are caught in the liquidation process without much utility. This can be arrested if the relevant authorities are vigilant to make necessary amendments to the various Acts, if necessary to ensure the liquidation process is dealt with expeditiously taking into consideration the public interest as a whole. The courts and relevant authorities must make an effort to deal with the complaints relating to liquidators within the spirit and intent of the Act to ensure transparency and professionalism in liquidation process. Complaint against liquidator with prima facie evidence should not be brushed aside or condoned as it will clog the liquidation process. It must be noted that the liquidation process is becoming a multi million ringgit business and because of lack of regulatory control and sanction and/or proper agreements with the parties more and more cases are acrimoniously fought in court all related to bona fide and/or transparency of the liquidation process. Much of court's time and revenue of tax payers is lost because of acrimonious litigation which could have been avoided if the solicitors for creditors and/or contributories have been prudent at the time of the appointment of the private liquidator.

[18] For reasons stated above except the above paragraph, I allow the applicants' application for the removal of the liquidator, Chuah Seong Phaik, with costs to be paid by Chuah Seong Phaik personally to the applicant, Cheah Theam Kheng in the sum of RM10,000, Equiticorp in the sum of RM10,000 and USSB in the sum of RM10,000 with the following directions:

- (a) the official receiver is appointed as liquidator to take conduct of the liquidation process from the date of the pronouncement of this order;
- (b) the official receiver to look into the complaints of the creditors and/or contributories pursuant to s 229 of the CA 1965 and/or any relevant section and/or Act;
- (c) the creditors and/or contributories be at liberty to lodge any complaint to the relevant authorities in respect of the liquidation process or commence any proceedings or complaint according to law in respect of the liquidation process;
- (d) Chuah Seong Phaik with prior appointment with official receiver to hand over all relevant files, documents, monies etc in respect of the liquidation to the official receiver in person within 20 working days from the date of this order, failing which the relevant parties may be at liberty to initiate contempt proceedings for non-compliance of this part of the order;
- (e) the official receiver to notify the solicitors for the applicant, Equiticorp and USSB, to be present when he is receiving, the above from Chuah Seong Phaik;
- (f) the official receiver within three months of the order compile a report of the status of the liquidation process and the view of the creditors and/or

- A contributories with a view for just, expeditious and economical conclusion of the liquidation process;
- (g) the applicant, Equiticorp and USSB, shall pay in advance a sum requested by the official receiver to meet with immediate disbursements if any for the purpose of attending to the liquidation process; and
- B (h) the applicant, Equiticorp and USSB, to pay allocatur before extraction of the order for costs. The deputy registrar to issue to the certificate for allocatur,

C [19] I hereby order so.

Application to remove liquidator allowed.

D Reported by Ashgar Ali Ali Mohamed

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